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Utah Supreme Court

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E. R. Christensen; Homer Holmgren; Attorneys for Defendants and Respondents;

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UNIVERSITY UTAH

Case No. 8538

OCT 31 1957

**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

**FILED**

APR 4 1957

JOHN W. SPENCER,

*Plaintiff and Appellant,*

vs.

L. C. CROWTHER, et al,

*Defendant and Respondent.*

Clerk, Supreme Court, Utah

**BRIEF OF DEFENDANTS AND RESPONDENTS**

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# IN THE SUPREME COURT of the STATE OF UTAH

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JOHN W. SPENCER,

*Plaintiff and Appellant,*

vs.

L. C. CROWTHER, et al,

*Defendant and Respondent.*

} Case No. 8538

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## BRIEF OF DEFENDANTS AND RESPONDENTS

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### STATEMENT OF CASE

Under date of May 29, 1951, the plaintiff, then a police officer in the Police Department of Salt Lake City, was discharged from the Police Department for the reason that he was not a bona fide resident of Salt Lake City. He appealed such discharge to the Civil Service Commission on May 31, 1951. On June 8, 1951, pursuant to a directive of the Civil Service Commission, the defendant Chief of Police Crowther filed a complaint with the commission specifying as ground for discharge that plaintiff was not a resident of Salt Lake City as

required by Section 15-6-6, Utah Code Annotated, 1943, now Section 10-6-6, Utah Code Annotated, 1953, and so was ineligible to hold office as a police officer.

On November 1, 1951, plaintiff requested a hearing before the Civil Service Commission, which request was denied. The denial of a hearing came about because in another identical case involving another officer the District Court of Salt Lake County had held that the Civil Service Commission did not have jurisdiction to entertain an appeal from a discharge based upon the failure of an officer to maintain residence in the City and that only the courts could adjudicate that matter.

Nothing more was done until May 1, 1953, eighteen months later, when plaintiff filed this action, seeking reinstatement and compensation from June 1, 1951. The complaint recites the foregoing facts except the reason for the commission denying plaintiff's request for a hearing. The defendants filed a motion to dismiss on the following grounds:

1. That the Complaint failed to state a claim.
2. That the court lacked jurisdiction of the subject matter, as being cognizable only by the Civil Service Commission.
3. That plaintiff was guilty of laches.

This motion was denied.

Defendants filed answers on June 9, 1953, as the matter was set for trial before Judge Martin M. Larson. No trial was held, however, and the matter was permitted to go dormant for another two years, when an

amended complaint was filed August 17, 1955, to bring in a newly elected City Commissioner and two new members of the Civil Service Commission. On August 4, 1955, defendants filed a motion to dismiss under Rule 41 (b) for failure to prosecute, more than two years having elapsed since the filing of defendants' answer. This motion was denied August 11, 1955, upon plaintiff agreeing to waive all salary due him since June, 1953, and defendants' answer should stand as to the amended complaint. Demand was then made for trial and the case was tried on March 27, 1956, nearly five years from the date of discharge.

The trial court found the facts to be in substance as follows: That plaintiff, since 1938 to June 1, 1951, was employed by Salt Lake City as a police officer, third grade, subject to the rules and regulations of the Civil Service Commission of Salt Lake City; that on May 29, 1951, the Chief of Police, L. C. Crowther, served written notice of discharge upon plaintiff, specifying that he was removed from the pay roll until such time as he became a bona fide resident of Salt Lake City; that plaintiff appealed from said order to the Civil Service Commission of Salt Lake City; that a complaint was filed with said Commission by the Chief; that thereafter, by arrangement with the Chief of Police and the Civil Service Commission, plaintiff was given until September 4, 1951, in which to move back into Salt Lake City as a resident thereof; that plaintiff on said date informed the Civil Service Commission he had decided not to move back into the City and thereupon his name was removed

from the classified Civil Service rolls; that on November 1, 1951 plaintiff requested a hearing before the Commission and such request was denied and his appeal to the Commission dismissed; that thereafter plaintiff brought this action; that plaintiff was not on May 29, 1951, or on June 1, 1951, nor had he been for several years prior thereto, and was not thereafter during the remainder of 1951, a qualified resident and elector of Salt Lake City, but during all of said time plaintiff was a resident of Salt Lake County outside the limits of Salt Lake City and so was ineligible to hold office as a police officer of Salt Lake City. Judgment was entered dismissing plaintiff's complaint.

### STATEMENT OF FACTS

The appellant's statement of facts is so sketchy that we deem it necessary to make a detailed statement. The page references are to the record page numbers.

Plaintiff's family consists of himself, his wife and son, 13 years of age (p. 66). He became a member of the Salt Lake City Police Department in 1938. He and his family moved from 2646 Beverly Street, in Salt Lake City, to a home in the county, located at 2111 Walker Lane in the spring of 1948 because of his boy's health (p. 68-p. 69). In 1950 he was advised by the Chief that he would have to be a resident of Salt Lake City (p. 69). He then left his family at Walker Lane and rented a room at 364 East 6th South in Salt Lake City and stayed there about six weeks, paying \$20.00 a month. He then



moved in with his brother, Clyde, at Fairmont Apartments, paying him as high as \$20.00 per month (p. 74, 84). This apartment consisted of a kitchen, a living room, a bedroom, bath and sleeping porch (p. 103). Plaintiff slept on the sleeping porch and stayed there until December, 1950 (p. 75). Then he rented a room at 823 Elm Avenue with his aunt for \$25.00 per month and stayed there until June, 1951. From there he went back to the Walker Lane residence about a week after his discharge from the police department. He and his family lived there until July 1, 1952, when they all moved to 2731 Fillmore Street in Salt Lake City where he has since resided (p. 78).

He was registered and voted in District No. 68 in Salt Lake City in 1942 to 1948, inclusive, his residence being given as 2646 Beverly Street. Notwithstanding he moved to Walker Lane in the spring of 1948 he nevertheless voted that fall in District No. 68. He registered in 1950 at the Fairmont Apartments but apparently did not vote that year (Exhibit 1).

During the time he stayed at Sixth South, Fairmount Apartments and Elm Street he had his work clothes with him. His other clothes were at Walker Lane. He had no cooking utensils with him and no furniture except a bed and bedding while staying at Fairmont Apartments. This he returned to Walker Lane when he went to Elm Street. Neither his wife nor boy ever stayed with him at Sixth South, Fairmont Apartments or Elm Street. His wife prepared no meals for him there. All

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this time his wife and boy lived at Walker Lane. He would go home to Walker Lane practically every day while he was staying at Fairmont Apartments and Elm Street, and would sometimes stay there overnight. He had his meals there when he was there. Upon getting his notice of discharge on May 29, 1951, he went back to Walker Lane within a week (p. 83 to p. 87). Except for the ban on living outside of the city he would have lived at Walker Lane all of 1951 (p. 90).

He and his wife were not estranged. His boy attended school in the county and gave his home address as 2111 Walker Lane. Plaintiff gave his name as parent and address at the same place. All groceries purchased were for the Walker Lane home. Plaintiff worked in the yard there, made repairs, had his laundry done there (p. 92-p. 93).

Plaintiff answered certain interrogatories propounded by defendants and these answers were introduced in evidence (p. 94). The interrogatories are found in the record at page 15 and the answers at page 28. From these answers appear the following facts: The electrical service for 2111 Walker Lane was applied for in his name and was never changed. The gas service was applied for in his wife's name and was never changed. His son attended the Oakwood School during the school years of 1948-1949, 1949-1950, 1950-1951. He attended Highland Park School in the school year of 1951-1952. Plaintiff's address given the school authorities was 2111 Walker Lane during all of the years his son attended the Oakwood School. On his Utah Income tax returns

for the years 1949, 1950 and 1951, plaintiff gave his address as 2111 Walker Lane.

The mail box at 2111 Walker Lane had the Name "J. W. Spencer" on it (p. 131). Lt. William Heninger testified that it was common knowledge that both he and the plaintiff lived in the county and that a few days before the service of the discharge order on May 29, 1951, he advised plaintiff to move into the city but plaintiff replied with considerable heat that he would not move into the city (p. 128).

It further appears from the testimony of Chief Crowther and Calvin Behle, who was chairman of the Civil Service Commission, that the Civil Service Commission attempted to settle the matter by getting plaintiff to move back into the city and then be given reinstatement. A meeting with plaintiff, his attorney, the Chief, Mr. Behle and counsel for the City was held July 9, 1951. It was there agreed that plaintiff should have a reasonable time to move into the city and be reinstated. The time was extended to just after Labor Day. See testimony of Crowther (p. 114-18) and Behle (p. 121-22).

Mr. Behle further testified that plaintiff's attorney informed him that plaintiff had decided not to sell his home and would not move into the city. Because of this decision by plaintiff, and the fact that the District Court in a companion case brought by Edward Jackson had held that the Civil Service Commission had no jurisdiction arising out of a discharge because of residence outside the city, the case before the Commission was closed

(p. 123). The minutes of the Civil Service Commission, Exhibit 7, show the sequence of events, the July 9th meeting, the extension of time to move into the City to September 4, 1951, the decision of plaintiff not to move back into the City and the denial of plaintiff's request for a hearing before the Commission and dismissal of his appeal by the Commission on November 1, 1951. Notice of this dismissal was served upon plaintiff under date of November 2, 1951, as shown by Exhibit 12.

## STATEMENT OF POINTS

### POINT I.

THE COURT LACKED JURISDICTION OF THE SUBJECT MATTER.

### POINT II.

PLAINTIFF WAS BARRED BY LACHES TO MAINTAIN THIS ACTION.

### POINT III.

PLAINTIFF'S ACTION SHOULD BE DISMISSED FOR FAILURE TO PROSECUTE DILIGENTLY.

### POINT IV.

THE EVIDENCE SUSTAINS THE COURT'S FINDING AND CONCLUSION THAT PLAINTIFF WAS NOT A RESIDENT OF SALT LAKE CITY AT THE TIME OF HIS REMOVAL FROM THE POLICE DEPARTMENT.

### POINT V.

THE COURT DID NOT ERR IN CONCLUDING AND ADJUDGING PLAINTIFF WAS LAWFULLY DISMISSED FROM THE POLICE DEPARTMENT.

## ARGUMENT

## POINT I.

## THE COURT LACKED JURISDICTION OF THE SUBJECT MATTER.

The record shows that in the spring of 1950 the Chief of Police issued a regulation that all officers must be bona fide residents of Salt Lake City. See Exhibit 8 and plaintiff's testimony page (69). This was in harmony with the provisions of 10-6-6, Utah Code Annotated, 1953, which reads:

“No person shall be eligible to any office, elective or appointive, who is not a qualified elector of the city or town.”

Holding office while ineligible would be a violation of this statute and would constitute misconduct and incompetency under the rules and regulations of the Civil Service Commission. Section 4-1 of these rules and regulations, page 48 of Exhibit 10, provides for removal from office for “misconduct, incompetency or failure to perform their duties or failure to observe properly the rules of the department wherein they are employed.” Section 4-2 defines misconduct, among other things, as (a) “violation of the laws of the State of Utah relating to the conduct and authority of the employee charged;” (d) “failure to properly observe the rules and regulations of the Civil Service Commission.” Section 4-5, page 50, defines failure to observe rules “disobedience of the orders of a superior officer or the general orders and rules of the department where employed.”

Plaintiff was discharged for failure to observe these regulations which are based upon the above statutory provision which makes him ineligible to hold office. Plaintiff appealed to the Civil Service Commission. The Chief of Police filed his complaint against plaintiff with that commission. The appeal was taken pursuant to section 10-10-21, Utah Code Annotated, 1953. Under the terms of that section jurisdiction to pass upon the rightfulness of the discharge is vested solely in the Civil Service Commission and its decision thereon is final.

We respectfully submit that a discharge based upon non-residence comes within the terms of the above referred to section which, by its terms, empowers the head of the department to remove a person for misconduct, incompetency or failure to perform his duties or failure to observe properly the rules of the department. If such dereliction does not come within the purview of this language then there would be no power in the chief to remove an officer for that cause. A suit would have to be commenced by someone in the nature of quo warranto to test the officer's right to hold office when he does not reside within the city. We submit the legislature did not intend such a result. The question of jurisdiction may be raised at any time and may be raised sua sponte by the court itself. 4 C.J.S., Sec. 45, p. 128; *Oldroyd v. McCrea*, 65 Utah 142, 235 P. 580.

Our motion to dismiss for lack of jurisdiction should have been sustained.

## POINT II.

PLAINTIFF WAS BARRED BY LACHES TO MAINTAIN THIS ACTION.

This action was not commenced until May 1, 1953, 23 months after the effective date of the discharge and 18 months after the denial by the Civil Service Commission of plaintiff's appeal to that body. There is nothing in the complaint to explain or excuse such delay. In a case of this kind, involving a public office, the burden was on plaintiff to allege facts showing due diligence. *City of Indiana vs. State*, 70 N.E. 2d, 635. See also *State vs. District Court*, 74 P. 497 One who seeks to compel his reinstatement to a civil service position must act promptly or be guilty of laches; *Hayman vs. City of Los Angeles*, 62 P. 2d 1049; *Hicks vs. City of Los Angeles*, 282 P. 2d 1046; 35 Am. Jur. Section 312, Page 65.

In 145 A.L.R. 767, this question of laches and acquiescence is extensively annotated. Cases are there collected which hold a delay of 18 months, one year, 15 months, 14 months, 10 months, 6 months, and so on, is sufficient to bar an action because of laches. Cases involving police officers are found on Page 779. See also *Corcoran vs. City of Los Angeles*, 289 P 2d 556. We submit that our motion to dismiss on the ground of laches should have been sustained.

## POINT III.

PLAINTIFF'S ACTION SHOULD BE DISMISSED FOR FAILURE TO PROSECUTE DILIGENTLY.

Defendants filed their answer to plaintiff's complaint on June 9, 1953. The case was set to be tried in June of 1953. No trial was held although defendants were prepared for trial. On July 6, 1955, more than two years later, the plaintiff filed a motion to file an amended complaint, as in the meantime changes had occurred in the personnel of the City Commission and the Civil Service Commission. This motion was heard August 11th at which time defendants moved to dismiss for failure to prosecute diligently under rule 41 (b), Utah Rules of Civil Procedure. The court denied this motion. We submit that the same considerations that make laches a bar to this kind of an action also require diligent prosecution by the plaintiff. Plaintiff's action should have been dismissed.

## POINT IV.

THE EVIDENCE SUSTAINS THE COURT'S FINDING AND CONCLUSION THAT PLAINTIFF WAS NOT A RESIDENT OF SALT LAKE CITY AT THE TIME OF HIS REMOVAL FROM THE POLICE DEPARTMENT.

Section 10-6-6 has been quoted heretofore. Section 20-2-13, Utah Code Annotated 1953, provides as follows:

"A resident within the meaning of this title is a person who has resided or will have resided continuously within this state for one year, and in the county four month, and in the precinct sixty days next preceding the day of the next ensuing election."



The pertinent parts of Section 20-2-14, Utah Code Annotated, 1953 read as follows:

(1) "That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning."

(8) "The place where a man's family resides is presumed to be his place of residence, but any man who takes up or continues his abode with the intention of remaining at a place other than where his family resides must be regarded as a resident where he so resides."

(9) "A change of residence can only be made by the act of removal joined with the intent to remain in another place. There can only be but one residence. A residence cannot be lost until another is gained."

Eligibility to office must continue while holding office and this rule applies to a police officer. In *State vs. Shores*, 48 Utah 76, 157 P. 225, the court construed Section 221 C.L. 1907, now Section 10-6-6, Utah Code Annotated 1953, and held that a police officer is an officer within that statute and that the word "eligible" means "capability of being legally chosen, and related to the legal capacity of being appointed, elected or chosen, as well as holding." That the word "eligible" means capable of holding an office is also held by the following cases: *People vs. Leonard*, 73 Cal. 230, 14 P. 853; *State vs. Clarke*, 3 Nev. 556; *Helwig vs. Payne*, 194 Cal. 524, 241 P. 884; *State ex rel Summerfield vs. Clarke*, 21 Nev. 333, 31 P. 545.

Residence under the election statutes means domicile and not mere physical presence at a place. In *Beauregard vs. Gunnison City*, 48 Utah 515, 160 P. 815, the court says:

“The domicile of a married man is presumed to be at the place where his wife or family resides. If Mrs. Knighton lived, that is, was domiciled in voting district No. 1, the presumption is that her husband also lived there, and the presumption would prevail until the contrary is shown.”

*State vs. Savre*, 129 Iowa 122, 105 N.W. 387, 3 L.R.A.N.S. 455, holds that the “word ‘residence,’ as employed in the election statutes is synonymous with ‘home,’ or ‘domicile’ and means a fixed or permanent abode or habitation to which the party, when absent, intends to return. Ordinarily little difficulty is experienced in determining the residence of a man with a family, for it is, save in exceptional cases, where the family lives or has their home.”

In *State vs. Atti*, 21 A. 2d 603, where defendant was convicted of voting in a district in which he was not a resident, the court says:

“A person may have more than one residence but may not have more than one domicile. His permanent home is his domicile and the place of his domicile determines his right to vote.”

See also 18 *Am. Jur.*, Sec. 54, page 216, Annotated Cases 1915 C. 792; *Davis Estate*, 43 P. 2d 115; *Texas vs. Florida*, 83 L. ed. 1179.

The mere fact that plaintiff registered in 1950 from the Fairmont Apartments does not establish that place

as his residence. Such action on the part of plaintiff cannot outweigh the facts established by the evidence that his home or domicile was at 2111 Walker Lane, to which place he returned as often as he could and at which place he would have stayed except for the requirement that he be a resident of the city and to which place he always intended to go and to which he did go. The facts in this case as outlined in our statement of the case are much similar to those in *Goldfeter vs. Hefferman*, 99 N.Y.S. 2d 959, where one Hall registered in one district and the facts pointed to the conclusion that his real residence or domicile was in another district.

The case of *In Re Stabile*, 348 Pa. 587, 36 A. 2d 451, is a case where the facts are in every respect similar to those in the instant case. This was an action to strike Stabile's name from the register of voters in the 8th District of the Third Ward of Pittsburg. The facts are these. He owned a dwelling house at 1306 Bedford Avenue in that district and ward, having 8 rooms, 4 being bedrooms. James Suriano, his wife, and four children lived there, rent free, and the utilities were in Suriano's name. Here Stabile had lived all his life up to 1930, and he still claims it as his legal residence. He always voted from this residence and from no other. In 1930 he bought another residence in Mt. Lebanon, where his children lived practically all the time. He has domestic help there but not at the Bedford Street residence. Mrs. Suriano manages the latter home and Stabile and his wife are privileged to sleep, dine and entertain in that home whenever they choose so to do. He testified he stayed

two or three nights a week at Bedford Avenue, sometimes a whole week, sometimes longer. His children stay there once in awhile; his clothes are at Mt. Lebanon, his children go to school at Mt. Lebanon; sometimes he slept at Mt. Lebanon. Mrs. Stabile testified all the groceries she bought were for the Mt. Lebanon home; they had no cooking utensils at the Bedford Street address; when she has a family dinner it is held at Mt. Lebanon. Sometimes she eats meals with her husband at the Mt. Lebanon address.

The court says:

"It is clear from the reading of this record that Stabile's home, i.e., his legal residence, is in Mt. Lebanon and that since 1930 he has attempted to maintain a 'voting residence' at 1306 Bedford Avenue, Pittsburgh. The act of June 3, 1937, P.L. 1333, Sec. 704, 25 P.S. Sec. 2814, declares that 'the place where the family of a married man or woman resides shall be considered and held to be his or her place of residence, except where the husband and wife have actually separated and live apart \* \* \*.' Stabile and his wife have *not* separated and do *not* live apart. They and their family are a unit and their only family home is in Mt. Lebanon. Stabile calls his Mt. Lebanon home his 'summer home,' but his three children reside there *all the year around* and go to school from that home. There is the only place where this family 'keeps house,' as Mrs. Stabile's testimony indicates. The 'Re-Statement of Conflict of Laws,' Sec. 13, declares as follows: 'A home is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and

the place.' Sec. 13, comment g., 'When a person has his family living with him in a dwelling-place, it is strong evidence that the dwelling-place is his home.' By every test laid down by the law this appellant's home in Mt. Lebanon Township is his *legal residence*.

"The courts have never accepted the contention sometimes made that a man's legal residence is wherever he *says* it is or where he says he *intends* it to be. An individual's legal residence is a question of fact which the state has a paramount interest in determining. A voter can vote only where his legal residence is; he can hold public office only if he resides in the political division his office serves."

\* \* \* \*

"Residence indicates permanency of abode as distinct from mere lodging or boarding. One of the rules for determining a person's residence, as prescribed in Sec. 704 (a) of the Election Code of 1937, 25 P.S. Chap. 2814 (a), *supra*, is the following: 'That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.'

"No one reading this record can doubt that the place to which Stabile 'intends to return' when he is away from home is the place in Mt. Lebanon where his wife, with the aid of a servant, keeps house and where his three young children sleep and eat and have practically all their existence, except for a few hours five days a week when they are in school. There and not to the Suriano home in Pittsburgh is where he goes when he returns from his labors, to the 'bosom of his family.' That is his home and his home is his legal residence."

As stated in *State vs. Savre*, supra, "a person cannot live in one place and by force of imagination constitute some other his place of abode." It is quite significant that plaintiff did not call his wife to testify. If anyone would know that plaintiff had established a domicile separate from her and her family she would.

We have not attempted to re-state the evidence under this heading, as we feel that statement of facts as made sufficiently shows that this case is in all respects within the facts and rules of law set out in the *Stabile* and *Goldfetter* cases, supra.

We submit that under the facts contained in the record there is ample evidence to sustain the court's finding of fact that plaintiff was not a resident of Salt Lake City at the time of his removal from the police department. That finding may not be disturbed if there is evidence to sustain it. We go further and assert, the court could not, upon this record have found otherwise.

#### POINT V.

THE COURT DID NOT ERR IN CONCLUDING AND ADJUDGING PLAINTIFF WAS LAWFULLY DISMISSED FROM THE POLICE DEPARTMENT.

Since the record amply sustains the finding that plaintiff was not a resident of Salt Lake City at the time of his removal, the conclusion of law follows that he was lawfully discharged from the police department. He could not hold office in that department if ineligible. *State vs. Shores*, supra, and cases cited under Point 4.

Furthermore, he was in violation of the rules of the department and the rules and regulations of the Civil Service Commission as pointed out in Point I.

### CONCLUSION

The record is clear that plaintiff's attempt to establish a residence in Salt Lake City, while his family resided outside the city at the Walker Lane dwelling was wholly specious. Under the statute he could have only one residence and under this record that was where his family lived. Not being a resident of Salt Lake City, he became ineligible to hold office as a police officer of that city. He was in direct violation of the regulation of the department that he must be a resident of Salt Lake City. This rendered him incompetent to discharge the duties of a police officer and constituted misconduct as well. We respectfully submit that plaintiff's action should be dismissed for lack of jurisdiction, laches and failure prosecute diligently, or that the judgment of the trial court dismissing plaintiff's action should be affirmed.

Respectfully submitted,

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